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Eugene R. Gaetke

University of Kentucky College of Law, ggaetke@uky.edu

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LITIGATING ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

FOREWORD

Renewed Introspection and the Legal Profession*

BY EUGENE R. GAETKE**

I. INTRODUCTION

As the twentieth century draws to a close, the legal profession is again immersed in a process of self-assessment, reflection, and reform. Operating on several fronts, various constituent elements of the bar have recently completed or have underway significant projects relating to the law of lawyering.

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** H. Wendell Cherry Professor of Law, University of Kentucky College of Law. B.A. 1971, J.D. 1974, University of Minnesota.

Two efforts stand out in particular.¹ For more than a decade,² the American Law Institute has labored in the production of a new *Restatement of the Law Governing Lawyers*,³ and the organization stands now on the brink of that monumental work's publication. Equally significant, the American Bar Association has again undertaken a comprehensive review of the prevailing codification of legal ethics through the efforts of its Ethics 2000 Commission,⁴ which is gathering comments on the continued adequacy of the ABA's current Model Rules of Professional Conduct.

One might ask, "Why now?" Certainly the advent of the year 2000 alone provides some motivation. Any New Year's Eve generates self-assessment and resolution among us all, so it is understandable that the

¹ There are at least two other significant projects. One is the amendment of the Federal Rules of Civil Procedure in 1993 to expand the disclosures mandated of litigants and their attorneys under Rule 26, *see* 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2053 (2d ed. 1994), and to adjust the treatment of sanctions under Rule 11, *see* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1331 (2d ed. 1990 Supp.). Another is the current movement within the federal courts for the implementation of system-wide rules to govern lawyers practicing before those courts. A special committee has been established by the United States Judicial Conference to consider the proposal. *See Federal Judges Weigh Ethical Proposal to Issue Uniform Ethical Rules*, [14 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 78 (Mar. 4, 1998); *Draft Federal Rules of Attorney Conduct*, [14 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 82 (Mar. 4, 1998); *Special Committee Will Study Federal Rules of Attorney Conduct*, [14 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 294 (June 24, 1998). On a related front, the Conference of Chief Justices and the Department of Justice are attempting to reach agreement on the proper resolution of the application of state ethics rules (such as Model Rule 4.2, prohibiting lawyers' communications with those known to be represented by counsel) to federal prosecutors. *See id.*

² The work on the *Restatement* began in 1986. *See* Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 *GEO. J. LEGAL ETHICS* 195, 200 (1987). Professor Wolfram, a leading national authority on legal ethics, served with distinction as Reporter throughout the work's preparation.

³ The new product is included in the American Law Institute's *Restatement of the Law Third* series even though there were no first or second versions of the *Law Governing Lawyers*.

⁴ The formation of the group, formally named the Commission on Evaluation of the Rules of Professional Conduct, is described at *ABA Starts "Ethics 2000" Project for Sweeping Review of Rules*, [13 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 140 (May 28, 1997) [hereinafter *ABA Starts "Ethics 2000" Project*].

coming of a new century, indeed a new millennium, spurs heightened reflection. Lawyers cannot be expected to resist these instinctive impulses on behalf of their profession in the face of such a momentous calendrical milestone.

It may also be significant that the legal profession is currently struggling with the professional ramifications of extraordinary technological advances, such as the Internet, which have strained assumptions regarding a wide range of legal institutions, relationships, and doctrines. The gap between the state of technology and the state of the law grows larger each day, and the law of lawyering is not immune.⁵ As awed bystanders witnessing the explosive growth of and disruptive change wrought by such technology, lawyers, like others, are finding it difficult to cope with the present even as they recognize the need to plan for the future.

For the legal profession, however, there is more to the current mood of introspection than the coming of the new century and the present and future shock of dramatic technological change. Sadly, on the eve of the year 2000, the nation is again enduring the turmoil engendered by allegations of indiscretion and misconduct at the highest levels of our national government and, also again and also sadly, lawyers are inordinately implicated. The impeachment of President Clinton, a lawyer and former law professor, on charges of perjury and obstruction of justice has serious public implications for the profession, as do the claims of prosecutorial misconduct on the part of Special Prosecutor Kenneth Starr and his staff. Indeed, lawyers pervaded the entire historic but sordid process, participating as

⁵ This is illustrated by the current frequency of technology-related questions arising in ethics contexts. *See, e.g.,* Unauthorized Practice of Law Committee v. Parsons Technology Inc., Civ. No. 3:97-CV-2859-H (N.D. Tex. Jan. 22, 1999), reported in *Federal Judge Bans Legal Software as Unauthorized Practice of Law*, [15 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 26 (Feb. 17, 1999) (finding that "Quicken Family Lawyer" software constitutes unauthorized practice of law and may be banned by state consistent with First Amendment); South Dakota State Bar Ethics Comm., Op. 98-10 (Jan. 12, 1999), reported in *South Dakota Ethics Panel Nixes Participation in Internet Referral Service*, [15 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 33 (Feb. 17, 1999) (holding that lawyer's participation in Internet lawyer referral service constitutes unethical advertising, fee-sharing, and assisting unauthorized practice of law); District of Columbia Bar Legal Ethics Comm., Op. 281 (Feb. 12, 1998), reported in *Lawyers' Use of Unencrypted E-Mail Does Not Violate Rule on Confidentiality*, [14 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 256 (June 10, 1998) (determining that lawyer's use of unencrypted electronic mail messages does not violate confidentiality rules).

targets of investigation, as prosecutors gathering and presenting evidence, as key witnesses, as grand jurors of a sort in the House and as petit jurors of a sort in the Senate, as House "managers" of the case against President Clinton, and as defense lawyers on his behalf. Nearly as much as during the drama involving President Nixon a quarter century ago, lawyers and their conduct are regularly the focus of the evening news, all too often in the most unflattering ways. For those concerned about the public image of the profession, it is particularly disheartening to hear prominent figures suggesting that the President stop listening to his lawyers and tell the truth, as if the two actions are incompatible. Given the substantial professional reflection generated by the Watergate episode in the early 1970s,⁶ it is not unreasonable to expect this present crisis to cause a similar response as we enter the new century.

Further incentive for professional self-reflection has also been provided by several notorious and remarkably public trials. The criminal prosecution of and subsequent civil litigation against O. J. Simpson for the murder of his ex-wife and a friend, as well as the criminal trials of Timothy McVey and Terry Nichols for their parts in the horrific violence of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, have also focused the public's attention, often negatively,⁷ on lawyers and their conduct. Through televised trials and constant media attention, the conduct

⁶ One tangible product of the Watergate episode, and of lawyers' involvement in it, was the ABA's adoption of an accreditation standard mandating the teaching of professional responsibility in some form in all law schools accredited by that body. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 194 n.62 (1986). While the requirement itself is unexceptionable, its adoption in the wake of the Watergate scandal hints at questionable logic. Did the Watergate defendants need further instruction in law school on the subject of obstruction of justice to know that what they were doing was wrong? Using the same logic, one can only wonder what law school subjects a new ABA accreditation standard might dictate to prevent a recurrence of President Clinton's present problems.

⁷ The public has always had difficulty with the role of lawyers defending those accused of crime. In offering reasons for why the legal profession is often blamed for a range of problems in society, Professor Wolfram notes:

[B]y their roles, many lawyers are forced into public performances that may appear unsavory. The most obvious illustration is the criminal defense lawyer. It is probably accurate, if controversial, to say that defense of persons accused of crime has led to more public antipathy toward the legal profession than any other cause. Yet, of course, it is both indispensable and honorable that lawyers continue in that and other difficult roles.

Id. at 4.

of lawyers in the operation of our judicial system has been both closely scrutinized and often criticized.⁸ It is understandable that the organized bar would react with self-evaluation and an eye toward reform.

Still, one wonders whether there is more to the present reflection within the bar and, ultimately, if the effort is worth it. Should lawyers really care about all of this professional introspection? More importantly, does it matter to the public broadly? By devoting this issue of the *Kentucky Law Journal* to the subject of "Litigating Zealously Within the Bounds of the Law," its editorial board has emphatically answered "yes" to both questions, and I concur.

II. WHY THE CURRENT INTROSPECTION MATTERS TO THE PROFESSION

Lawyers may have some cause for skepticism about whether the current efforts at reflection and reform should matter to them.⁹ Within the present century, the American Bar Association has already scrutinized the adequacy of the regulation of legal ethics three times, resulting in new bodies of rules in 1908 ("the 1908 Canons"),¹⁰ 1969 ("the Code"),¹¹ and 1983 ("the Model Rules").¹² In addition to its repeated, indeed nearly continuous,¹³ promulgation of ethical rules during this century, the ABA

⁸ The O. J. Simpson criminal trial resulted in more than 300 ethical complaints being filed against the lawyers involved. *See California Bar Takes Action Against Lawyer for O.J. Simpson*, [14 Current Reports] *Laws. Man. of Prof. Conduct* (ABA/BNA) 179 (June 25, 1997).

⁹ During the process leading to the ABA's adoption of the Model Rules, the issue was debated robustly by a number of legal scholars in an enlightening 1981 symposium in the *Texas Law Review* entitled "Ethical Codes and the Legal Profession." Two leading scholars there concluded that ethical codes do matter to the profession but for reasons of self-interest. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *TEX. L. REV.* 639 (1981); Deborah Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 *TEX. L. REV.* 689 (1981).

¹⁰ CANONS OF PROFESSIONAL ETHICS (1908).

¹¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

¹² MODEL RULES OF PROFESSIONAL CONDUCT (1983).

¹³ Each of the three codifications of legal ethics were regularly amended by the ABA. The original 32 provisions of the 1908 Canons were expanded to 47 before 1970. *See* CANONS OF PROFESSIONAL ETHICS (1908) (as amended), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 618 (1999). After its adoption in 1969, the Code

has also sponsored several widely publicized studies and reports on the status of the profession and the need for reform.¹⁴ The frequency of these efforts alone might justify widespread professional *ennui* if not outright cynicism about the current review and reform activities.¹⁵ It may be tempting for those in the profession to dismiss the present efforts as just more of the same compulsive behavior on the part of the organized bar.

was amended on a number of occasions in response to criticisms and litigation, before its eventual abandonment through the ABA's adoption of the Model Rules. See Eugene R. Gaetke, *Kentucky's New Rules of Professional Conduct for Lawyers*, 78 KY. L.J. 767, 769 (1989-90). Those Model Rules have not been immune to change. Since adopting the Model Rules in 1983, the ABA has amended them 29 times. See ABA Starts "Ethics 2000" Project, *supra* note 4, at 140-41. For example, changes have been made to Model Rules 1.9 (conflicts involving former clients), 1.10 (imputed disqualification), 3.6 (trial publicity), 3.8 (responsibilities of a prosecutor), 5.4 (professional independence of a lawyer), 6.1 (pro bono service), 7.2 (advertising), 7.3 (solicitation), 7.4 (communicating fields of practice), 8.3 (reporting professional misconduct), and 8.5 (choice of law), and new Model Rules have been offered to govern the sale of a law practice (Rule 1.17) and the provision of law-related services (Rule 5.7). Compare MODEL RULES OF PROFESSIONAL CONDUCT (1983), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1984 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 67-166 (1984), with MODEL RULES OF PROFESSIONAL CONDUCT (1998), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1-108 (1999).

¹⁴ Two stand out in particular. One, referred to as the "Stanley Commission" in honor of Justin A. Stanley who served as the group's chair, was formed in response to the contention of Chief Justice Warren Burger, among others, that the level of professionalism within the bar was declining. See A.B.A. COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM at v (1986). The second was the so-called "MacCrate Report," similarly bearing the name of the chair of the task force that prepared it, which offered a statement of the essential skills and values of a lawyer and a proposal for furthering those skills and values throughout the educational continuum of becoming and being a lawyer. See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135-221 (1992).

¹⁵ While the Ethics 2000 Commission was given a broad charge to engage in an in-depth review of the adequacy of the Model Rules, it may be of some comfort to lawyers fearing adoption of yet another set of ethical rules that the ABA apparently did not have in mind the abandonment of those rules when it formed the project. See ABA Starts "Ethics 2000" Project, *supra* note 4, at 140.

For lawyers, however, there is more at stake in the current self-reflection than merely alleviating everyday professional angst. Simply put, all is not well with and within the profession. There is a distinct yearning, by those within and without the bar, for lawyers to display more "professionalism."¹⁶ Legal scholars have reflected that yearning in a number of books¹⁷ and articles.¹⁸ Indeed, some observers have opined that the legal profession faces a crisis of professionalism¹⁹ at the dawning of the

¹⁶ Although much has been written about it, there is no consensus on the meaning of the word "professionalism." Professor Michael J. Kelly contends that lawyers use the term so frequently and in so many different ways (the author lists 11 variations) that it has lost its meaning. See MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 5-7 (1994). Professor Kelly notes:

Practicing lawyers are *never* opposed to professionalism. Professionalism is the law's apple pie and motherhood. It is a kind of incantation, or blessing, conveniently large enough to serve as the antidote for an enormous array of discontents, from billable-hour regimens to excessive partisanship, from abuse of discovery to acquisitiveness. Or professionalism is used to rationalize new business practices and department structures—or lack thereof—by law firms who use their particular house brand of professionalism as a tool for recruiting new associates or lateral hires. No common, coherent concept of professionalism informs the actions of twentieth-century lawyers in the United States because of the deep confusion between the horizontal and the vertical cultures of professionalism. The organization uses or reinvents common understandings of professionalism for its own purposes.

Id. at 14.

¹⁷ Among the most important of these books are MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994), and ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

¹⁸ Professor Susan Daicoff's 1997 research revealed 145 law journal articles with the word "professionalism" in the title. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 n.33 (1997).

¹⁹ The breadth of meaning of the term "professionalism" makes its useful for declaring the presence of a crisis regarding it, although the evidence as to the actual existence of such a crisis tends primarily to be anecdotal. See Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*, 7 GEO. J. LEGAL ETHICS 987 (1994). One enlightening study shows that claims of such crises are common. Rayman Solomon observes that concerns about

new century This sense of crisis is reflected in three common observations about the legal profession: the public is dissatisfied with lawyers, lawyers are dissatisfied with other lawyers, and many lawyers are dissatisfied being lawyers.²⁰

Public opinion about the trustworthiness of the legal profession, never very good,²¹ appears to be falling steadily ²² To make matters worse, this

professionalism remained relatively constant during a 35-year period of great social, political, and economic change, although there were five periods that might be characterized as crises. See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in ROBERT L. NELSON ET AL., *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 145 (1992). The author does perceive important differences between the earlier crises in professionalism and that alleged in the 1980s and 1990s:

What is unique about the present is that concern over commercialism has become a crisis. The perception of the public's loss of confidence in the legitimacy of the profession may stem from the perceived lack of separation between law and business. Prior crises stemmed from the perceived loss of political autonomy or autonomy *over* the market, not, as currently, from the loss of autonomy *from* the market. The question becomes: Why is commercialism the perceived crisis today? The answer appears to be related to the current dramatic changes in the economic structure of the practice of law.

Id. at 173.

²⁰ Noting these three observations, Professor Daicoff describes the current situation as being a "tripartite crisis." Daicoff, *supra* note 18, at 1340. She notes, "In the last ten to fifteen years, three related crises have emerged with respect to the legal profession: 'professionalism' has declined, public opinion of attorneys and the legal profession has plummeted, and lawyer dissatisfaction and dysfunction have increased." *Id.*

²¹ See WOLFRAM, *supra* note 6, at 3 n.7

²² One summary of survey data from the past quarter century indicates the decline:

In 1973, the percentage of Americans with "great confidence" in law firms was 24 percent, according to pollster Louis Harris. Five years later, in 1978, another Harris poll indicated that this level of "great confidence" had dropped to 18 percent. In 1988, a Harris poll showed that the level had eroded even further to 14 percent.

This year, according to the [1993 ABA-commissioned] Peter Hart survey, only 8 percent of Americans had a great deal of confidence in law firms

Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 64.

is occurring at a time when the profession is making concerted efforts to improve its public image,²³ suggesting that the bar's attempted remedies are not working very well.

At the same time, lawyers are increasingly frustrated with the conduct of other lawyers. There is a perception within the bar that the incidence of incivility and overly aggressive, "win at all costs" behavior are on the rise,²⁴ perhaps as a result of heightened economic pressures in the practice of law.²⁵ Most lawyers also expect that the situation will only get worse.²⁶

Given the low public opinion of and the perceived incidence of unprofessional behavior by lawyers, perhaps it is not surprising that many lawyers are dissatisfied in their choice of profession. Still, the numbers are dramatic, with some surveys revealing a majority of lawyers to be disappointed with their career choice.²⁷ The effects of this dissatisfaction on lawyers, their clients, and the public are serious. Lawyers are considered to be the professionals exhibiting the highest incidence of depression,²⁸ with some estimates indicating that one-third of lawyers may be so afflicted.²⁹ This level of depression may explain other problems within the

²³ See Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOYOLA U. CHI. L.J. 719, 719-20 (1998).

²⁴ Professor Deborah Rhode notes that "[a]bout three-quarters of surveyed members of the profession believe that attorneys are more money-conscious, half think they are less civil, and a third report that they are more likely to lie than in earlier eras." Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 297 (1998) (footnote omitted).

²⁵ See *id.* at 299 ("Part of the dishonesty, incivility, and acrimony that lawyers find troubling in current practice seems driven by these profit dynamics.").

²⁶ See *id.* at 307 ("About two-thirds of surveyed attorneys predict that collegiality and civility will continue to decline").

²⁷ See *id.* at 296. Professor Rhode notes:

A majority of lawyers report that they would choose another career if they had the decision to make over, and three-quarters would not want their children to become lawyers. About one-quarter of young attorneys are dissatisfied with their current position, and a slightly greater number are dissatisfied with the practice of law in general.

Id. at 296-97 (footnotes omitted). One survey showed that this dissatisfaction is particularly high among certain segments of the profession. Among women solo practitioners it is 55%, while 43% of men solo practitioners are dissatisfied. See Jon Jefferson, *But What Role for the Soul?*, A.B.A. J., Dec. 1991, at 60, 60. Even within law firms, women express considerable dissatisfaction, whether partners (42%) or associates (40%). See *id.*

²⁸ See Steven Keever, *Defeating Dissatisfaction*, A.B.A. J., Sept. 1992, at 38.

²⁹ See Rhode, *supra* note 24, at 297

profession, including alcoholism and other substance abuse,³⁰ which in turn may lead to malpractice and disciplinary offenses.³¹

It is this pervasive feeling of discontent about the profession, shared by lawyers and non-lawyers alike, that should make the current introspective efforts matter to lawyers. It is not an overstatement to conclude that, at the turn of the century, the legal profession finds itself at a critical juncture. At stake in the present efforts at self-reflection and reform are the public's confidence and the profession's soul. The question is whether the profession can so define its key values that the public's trust in the profession will rise while lawyers' dissatisfaction with other lawyers and with the practice of law will decline. It is a daunting task but surely one that matters to the profession.

III. WHY THE CURRENT INTROSPECTION MATTERS TO THE PUBLIC

Lawyers may understandably find value in the present efforts at review and possible reform because of their own interest in attaining heightened self-esteem, improved career satisfaction, and more public confidence in their profession. An even more compelling question, however, is whether there is any broader significance in the bar's current reflection and the prospect for reform. As important as the efforts may be for lawyers, does any of this matter to the public?

Surely the answer is yes. Of course, everyone may at some time be a client, and so the formally defined responsibilities of lawyers may make a difference to members of the public in those instances. In this regard, it is interesting that there is evidence that the profession has a better reputation among those who have never used the services of lawyers than among those with frequent exposure to them.³² For the substantial portion of the public that deals with lawyers or will do so in the future, therefore, the current efforts of self-reflection may hold some promise of a better experience, offering some advantage to the public, at least as it is made up of actual and potential clients.

More importantly, however, many of the most pressing professional issues for lawyers also are important determinants of the public's view of

³⁰ See Rick B. Allan, *Alcoholism, Drug Abuse, and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 265-66 (1997); Rhode, *supra* note 24, at 297

³¹ See Allan, *supra* note 30, at 266, 268-69; Keeva, *supra* note 28, at 38.

³² See Hengstler, *supra* note 22, at 61.

the legitimacy of the judicial process itself.³³ In this sense, any reflection on and reform of the proper role of lawyers in that process may have an impact on the way the public feels, not just about the legal profession but about the sanctity of judicial decisions and even about the law more broadly

This point was made by David Luban, a leading legal ethics scholar, when he observed that, for the public, “the lawyers are the law.”³⁴ In his view, “our nation is so dependent on its lawyers that their ethical problems transform themselves into public difficulties. Put simply the ethical problems of lawyers are social and political problems for the rest of us.”³⁵ The profession’s present efforts at reflection, therefore, cannot be viewed as merely the concern of lawyers, or even of lawyers and their clients, for they have a broader public impact.

President Clinton’s recent difficulties offer interesting illustrations of Professor Luban’s point, for they raise a number of the troubling professional issues for lawyers that certainly affect the public’s trust in the legal process. A few examples can be noted. Are lawyers acting appropriately in advising their clients to testify narrowly to achieve technical truth when the overall impression from the testimony may be false? Should government lawyers shield from disclosure their conversations with government officials or should private lawyers avoid production of notes of meetings with their deceased clients? At what point does appropriate though zealous preparation of a witness become unethically assisting that witness to testify falsely? What information regarding an on-going investigation is properly disclosed to the press despite its possible effect on the target of that investigation? What may prosecutors properly promise or threaten in an

³³ This thought was captured by the ABA in the Preamble to the 1908 Canons, where it was somewhat grandiosely noted that the “future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.” *Preamble to CANONS OF PROFESSIONAL ETHICS* (1908) (as amended), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 618 (1999).

³⁴ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* at xvii (1988).

³⁵ *Id.* at xviii. Professor Rhode has expressed a similar conclusion:

Part of what the public dislikes about the legal profession is hard to disentangle from what it dislikes about the law, the legal system, and the lawyer’s role within that system. Because the bar exercises so much power over all of the matters, it is also held accountable for systemic failures.

Rhode, *supra* note 24, at 287

effort to obtain "cooperation" of important witnesses? The answers to these questions surely are important to the lawyers, their clients, and others immediately involved, but they also surely have an impact on how the public judges the fairness, the integrity, and the legitimacy of the outcome of the proceedings.

The present efforts of self-reflection within the bar, therefore, do matter to the public. When the organized bar addresses or ignores significant issues of professional conduct for lawyers, the public's confidence in the judicial process, as well as in the legal profession, is affected.

IV THE DIFFICULT TASKS OF REFLECTION AND REFORM

Merely stating the importance of the current level of self-study and possible reform within the bar does not reveal the immense difficulty of the task. To be successful in regaining a sense of purpose for the bar and the public's confidence in the profession and the legal system more broadly, the process must accomplish two herculean feats. It must achieve consensus within the profession on important but difficult issues of professional responsibility, and then it must justify these positions before the public.

The consensus part is hard enough. This struggle was evident in the American Law Institute's effort to restate the law pertaining to lawyer-client confidentiality.³⁶ Early deliberations by that body on this fundamental professional issue revealed that many members of that respected institution were not willing to accept the less savory implications of established principles of confidentiality.³⁷ For example, discussion stalled on the inclusion of an illustration demonstrating that the duty of confidentiality precluded a lawyer's revelation of a communication indicating that a client had committed a murder for which another person faced trial.³⁸ Members expressed outrage and horror at this application of the principle, and the illustration was deleted even though it accurately reflected the existing law and the outcome of an actual case.³⁹

The episode demonstrates a critical problem inherent in deliberations about controversial but fundamental professional values. Often the decision makers are unable to resolve, at times are unwilling even to confront, the most compelling ethical issues, choosing to resort instead to omission,

³⁶ For a description of the ALI's deliberations on the issue, see *Annual Meeting of American Law Institute*, 57 U.S.L.W. 2686, 2687-88 (May 30, 1989).

³⁷ See *id.* at 2688.

³⁸ See *id.*

³⁹ See *id.* The case is *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976).

vagueness, or precatory language.⁴⁰ For the profession to be successful in winning the confidence of the public, however, it must overcome this tendency and be willing to declare its position boldly on such issues.

Hard as obtaining consensus on many important professional issues will be, the task of convincing the public of the propriety of the rules adopted will be even more difficult. Obviously, the American public has never been enamored of lawyers. In the present environment of scandals in Washington and amidst ubiquitous lawyer jokes, it is hard to imagine that the bar could successfully move the public to embrace the fundamental professional concepts of confidentiality and all of its ramifications, of zeal on behalf of criminal defendants, of withholding crucial facts unknown to the other side in litigation, and so on. Difficult though it may be for lawyers to accomplish this task, it is imperative that these efforts be made if the profession is to overcome the public discontent currently engulfing it. This is more than a matter of public relations or imagery for the profession. It is part of the process of gaining at least some popular support for the profession's resolution of issues that matter to the public.

In making those efforts, it must be realized that what may be most damaging to the profession in projecting a defensible and trustworthy image to the public is the apparent hypocrisy inherent in many of the organized bar's positions and pronouncements. The bar maintains that public service is an essential component of professional behavior yet refuses to mandate it.⁴¹ The bar asserts that civility is crucial to the operation of the judicial system while it buries the contention in "civility codes" expressly providing that they are not intended to be enforced.⁴² The

⁴⁰ Professor Rhode has made the point more broadly:

The central problem facing the American legal profession is its own unwillingness to come to terms with what the problems are. At issue are competing values and concerns. Yet bar commentary on professionalism tends to paper over two central conflicts: the tensions between lawyers' economic and noneconomic interests and the tensions between professional and public interests.

Rhode, *supra* note 24, at 308

⁴¹ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1998) ("A lawyer *should aspire* to render at least (50) hours of pro bono publico legal services per year.") (emphasis added). The comment to the rule notes that the provision of such services is a "responsibility" of every lawyer, but expressly declares that it "is not intended to be enforced through disciplinary process." *Id.* Rule 6.1 cmt.

⁴² A good example is the Seventh Circuit's attempt at such a code. While the drafters of that document found that "the decline of civility standards in litigation practice is among the most important . . . issues facing the legal community today,"

bar declares the importance of confidentiality⁴³ yet provides a broad exception to serve lawyers' interests⁴⁴ while, at the same time, providing only the most limited exception for protecting the lives and safety of others from a client's violence⁴⁵ and offering no exception to protect innocent persons from a client's fraud.⁴⁶ The bar broadly asserts that lawyers are officers of the court while providing little substance for the label.⁴⁷ If it is serious about winning the public's confidence and in restoring even lawyers' faith in the profession, the bar needs to deal with this dissonance

they also provided that the "standards shall not be used as a basis for litigation or for sanctions or penalties," preferring instead merely to declare that they "expect judges and lawyers will make a mutual and firm commitment to these standards." *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441, 444, 448 (7th Cir. 1992).

⁴³ The comment to Model Rule 1.6 declares that "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt.

⁴⁴ Under the Model Rules' provision on confidentiality, a lawyer may reveal confidential information with the reasonable belief that it is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.* Rule 1.6(b)(2).

⁴⁵ The exception extends only to a criminal act that "the lawyer believes is likely to result in imminent death or substantial bodily harm." *Id.* Rule 1.6(b)(1).

⁴⁶ The final version of Model Rule 1.6 did not include an exception for revealing a client's intention to commit fraud. *See id.* Rule 1.6. In adopting the Model Rules, however, a number of states provided such an exception to the duty of confidentiality. For a comparison of state approaches to confidentiality under the adopted versions of the Model Rules, see THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 133-42 (1999). The Ethics 2000 Commission of the ABA has released a draft of a proposed amendment to Model Rule 1.6 which would authorize disclosure of confidential information "to prevent a client from committing a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." *Ethics 2000 Commission Releases Draft for Amendments to Some ABA Model Rules*, [15 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 43 (Feb. 17, 1999).

⁴⁷ I made this point at length previously. *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

between its proclamations as to professional values and its rules of professional behavior. The public will not take lawyers seriously if what they say is not consistent with what they do. Lawyers too will continue to suffer the same disillusionment with other lawyers and with their own professional roles if the bar cannot reduce the apparent level of hypocrisy inherent in positions it takes.

This is not to say that the legal profession should be timid in its defense of traditional professional values or quick to abandon present rules encouraging zeal and loyalty in the representation of clients. Similarly, despite criticism of the excesses of the adversary system, it is not clear that lawyers need apologize for their role in it. At a time recognized by many as presenting a crisis of professionalism for lawyers, however, both the profession and the public deserve a careful and critical examination of the present balance of the private needs of clients for zealous representation and the public's concerns about the judicial process. When that examination has been done, the public needs to hear the profession's justification for the adjustments made or not made to the present balance.

It is likely that this review and any needed reform will necessarily take time. The stakes are sufficiently high for the profession and for the public, however, that even incremental progress will be welcome.

V "LITIGATING ZEALOUSLY WITHIN THE BOUNDS OF THE LAW"

In the present atmosphere of introspection within the legal profession, the articles comprising this symposium issue are of particular importance. They are written by noted experts in the field of legal ethics and offer timely comments on many of the difficult issues confronting the legal profession today.

Indeed, the articles selected for inclusion in this symposium demonstrate the importance of the present process for both the profession and the public. The issues discussed deal with professional conduct of lawyers but also with the broader implications of the profession's role in the legal system. Several of the articles focus on specific professional duties in the adversary process. Exceptions to the attorney-client privilege,⁴⁸ limits on

⁴⁸ H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191 (1998-99); Edward J. Imwinkelried & James R. McCall, *Minnesota v. Philip Morris, Inc.: An Important Legal Ethics Message Which Neglects the Public Interest in Product Safety Research*, 87 KY. L.J. 1127 (1998-99); Richard S. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165 (1998-

coaching witnesses,⁴⁹ dealing with lies and lawyering,⁵⁰ disclosures of harmful facts during negotiations,⁵¹ revealing secret settlements,⁵² and making appropriate use of litigation techniques⁵³ are all important matters between lawyers and their clients, but they also have a direct impact on the truth-seeking function of litigation and the public's faith in the outcome of trials. Three of the four student-written pieces focus on possible changes to the rules that guide our ethical decisions and the effects such changes may have.⁵⁴ Finally, one of the articles addresses the current process of introspection itself, asking us to consider carefully whether it truly would be wise to yield any of our present professional expectations of zealous representation.⁵⁵

The articles, notes, and comments that follow, therefore, are both timely and important. In an era that can be characterized as one of professional crisis and introspection, they address topics that matter greatly to lawyers and their clients. More than that, however, in a society in which it can be said that "lawyers are the law,"⁵⁶ they explore topics of immense public concern as well.

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⁴⁹ Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1998-99).

⁵⁰ Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919 (1998-99).

⁵¹ Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1998-99).

⁵² William H. Fortune, *A Proposal to Require Lawyers to Disclose Information About Procedural Matters*, 87 KY. L.J. 1099 (1998-99).

⁵³ Ross Thomas Turner, Note, *Rule 26(c)(7) Protective Orders: Just What Are You Hiding Under There, Anyway?*, 87 KY. L.J. 1299 (1998-99).

⁵⁴ Melissa Bartlett, Comment, *Fixing Rule 1.6: The Montreal Formulation Makes It Work*, 87 KY. L.J. 1331 (1998-99); Parker D. Eastin, Note, *Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers' Professional Misconduct?*, 87 KY. L.J. 1271 (1998-99); Craig Paulus, Comment, *Ethics 2000 and Insurance Defense Conflicts of Interest in Kentucky*, 87 KY. L.J. 1349 (1998-99).

⁵⁵ W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019 (1998-99).

⁵⁶ LUBAN, *supra* note 34, at xvii.